STATE OF MICHIGAN
IN THE SUPREME COURT

LAWRENCE T. CURTIS,

Plaintiff-Appellee,

V

CITY OF DETROIT,

Defendant-Appellant. /

Supreme Court No. 125652

Court of Appeals No. 241632

Wayne County Circuit Court
No. 00-032355 CH

KIM CORBIN P39273
Attorney for Plaintiff-Appellee
15206 Mack Ave.
Grosse Pointe Park, MI 48230
313 886-4466

SHERI L. WHYTE P41858
Attorney for Defendant-Appellant
CITY OF DETROIT LAW DEPARTMENT
1650 First National Building
Detroit, MI 48226
(313) 237-3076 /

125652

PLAINTIFF-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
EXHIBITS A-H
PROOF OF SERVICE

BY: KIM CORBIN P39273
Attorney for Plaintiff-Appellee
15206 Mack Ave.
Grosse Pointe Park, MI 48230
313 886-4466

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

RESPONSE TO APPLICATION STATEMENT

This case involves an award of damages to the Plaintiff to compensate him for the City of Detroit tearing down his building without giving him any notice of an impending demolition. The building was torn down more than five years after a Lis Pendens notice had been recorded with the Register of Deeds. The trial Judge and the Court of Appeals ruled that the Lis Pendens that was recorded had expired by operation of law prior to Plaintiff's purchase.

On June 30, 1994 the Detroit City Council ordered the demolition of the building. At that time the building was actually owned by the City of Detroit. The City was involved in selling the building to an elderly woman, Barbara Hoyle. It is not disputed that Mrs. Hoyle was never given notice of the hearing before the City Council. Indeed, the notice of hearing was sent to the City of Detroit Community and Economic Development Department.

Prior to that City Council hearing, on June 7, 1994 the City recorded a Lis Pendens with the Wayne County of Register of Deeds. The Lis Pendens gave constructive notice of the demolition proceedings to any persons subsequently obtaining any interest in the subject property.

More than four years after the City Council hearing, and the recording of the Lis Pendens, Barbara Hoyle sold the property to Plaintiff Respondent by quitclaim deed dated November 13, 1998.

Plaintiff CURTIS had no knowledge of the impending demolition. He had made substantial repairs after acquiring the property.

In September 1999, the City had the building demolished. The City did this without making any effort to identify any persons who might have an interest, now five years later. It was done more than two years after the Lis Pendens expired by operation of law.

Plaintiff Respondent's position is that the City was a trespasser. The only authority for entering on to the land, and demolishing the building, was by virtue of the demolition order, of which Plaintiff Respondent had no knowledge. The City had properly recorded a Lis Pendens to give subsequent purchasers notice, but that Lis Pendens had expired.

The City of Detroit contends that it can order a demolition, and demolish the building whenever it wants. Plaintiff Respondent replies that the City must act within the lifetime of the Lis Pendens, or risk demolishing a building that belongs to an innocent third party. This would be a three-year period, but could be extended by statute for three additional years.

The Circuit Court and Court of Appeals agreed with Plaintiff Respondent. The Courts refused to substitute for the lis pendens process the City of Detroit's interpretation of law.

Defendant Applicant, CITY OF DETROIT, states four issues in its Application. It suggests that it is not required to give notice to subsequent purchasers. This is a very dangerous proposition in that the race-notice provisions of Michigan real property law emphasize marketability of title. The policy implications of making it the risk of the buyer to determine **outside** the chain of title whether a demolition order may exist are

profound. This is contrary to the overall policy of Michigan real property law stressing free alienability.

Secondly, the CITY suggests governmental immunity, but can show no jurisprudence to support this proposition. Even, if the recent expansion of immunity was relevant to these facts, that immunity is not to be applied to any cases filed before April 2, 2002. This case was filed October 3, 2000.

Thirdly, the CITY completely ignores the trial court record in suggesting that that Court did not clearly articulate the legal theory on which it found liability. The trial judge repeatedly stated that it was a trespass.

Fourthly, the CITY argues that the trial judge's award of interest as part of Plaintiff's is contrary to MCL 600.6013(8). Again, this is an argument that ignores long-standing Michigan case law.

This is a very clear case of the CITY failing to timely act within the three year life of the Lis Pendens. The decisions of the trial judge and the Court of Appeals are based on clear precedent, and are necessary for the orderly function of Michigan real estate law.

STATEMENT OF JURISDICTION

Defendant-Appellant filed this Application for Leave to Appeal pursuant to MCR 7.302. Defendant-Appellant, Cit of Detroit, appealed the Order Denying Defendant City of Detroit's Motion to Set Aside Judgment, entered May 3, 2003; the Judgment, entered March 25, 2002; the Order Denying Defendant City of Detroit's Motion for Reconsideration of Order Granting Plaintiff's Motion for Summary Disposition, entered March 8, 2002; and the Order Granting Plaintiff's Motion for Summary Disposition, entered January 25, 32002. Defendant City filed its Motion to Set Aside Judgment under MCR 2.610(A)(1) on April 15, 2002. The trial court denied this Motion by Order entered May 3, 2002, and Defendant filed its Claim of Appeal in the Court of Appeals on May 23, 2002.

On November 25, 2003, the Court of Appeals issued its per curiam opinion in this case (Exhibit S), affirming the Judgment in part and vacating in part (as to $2,000.00 in property taxes which the trial court included as damages.). On December 16, 2003, Defendant filed a Motion for Reconsideration in the Court of Appeals, which that Court denied by Order entered January 12, 2004. The Application followed.

Plaintiff-Appellee asks that this Court deny Leave to Appeal.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE CITY OF DETROIT COMPLY WITH ALL LEGAL REQUIREMENTS IN GIVING NOTICE FOR HE DEMOLITION OF PLAINTIFF'S PROPERTY?

The trial court answered	"No."
The Court of Appeals answered	"No."
The Appellant answers,	"Yes."
The Appellee answers,	"No."

II. IS THE CITY OF DETROIT IMMUNE AS A MATTER OF LAW TO PLAINTIFF'S CLAIMS FOR GROSS NEGLIGENCE AND TRESPASS?

The trial court answered	"No."
The Court of Appeals answered	"No."
The Appellant answers,	"Yes."
The Appellee answers,	"No."

III. DID THE TRIAL COURT FAIL TO CLEARLY ARTICULATE ON WHICH LEGAL THEORY IT GRANTED JUDGMENT TO PLAINTIFF, NECESSITATING AT A MINIMUM REVERSAL AND REMAND?

The Court of Appeals answered	"No."
The Appellant answers,	"Yes."
The Appellee answers,	"No."

IV. DID THE TRIAL COURT ERR IN AWARDING PREJUDGMENT INTEREST TO THE DATE OF THE DEMOLITION, AND DAMAGES FOR PROPERTY TAXES THAT PLAINTIFF ALLEGEDLY PAID?

The Court of Appeals answered	"No."
The Appellant answers,	"Yes."
The Appellee answers,	"No."

STATEMENT OF FACTS

This appeal is from a Judgment awarding Plaintiff damages in the amount of $40,513.79 from his lawsuit against the CITY OF DETROIT for improperly demolishing his building.

On or about September 13, 1999 the CITY OF DETROIT demolished the property located 9143 Mack Avenue in the City of Detroit. It is undisputed that Plaintiff was never served with any notice informing him that the CITY was pursuing demolition.

The CITY's records indicate that five years prior to this the CITY authorized the demolition of the building. The CITY OF DETROIT had recorded a lis pendens, dated June 7th, 1994, with the Register of Deeds on December 16th, 1994. [Exhibit A]

Plaintiff LAWRENCE CURTIS became interested in the subject property in 1998. He was looking for a site to open a "Dollar Store." He purchased the subject property from Barbara Hoyle, receiving a quitclaim deed to the property dated November 13, 1998. [Exhibit B]

More than four years prior to the purchase the CITY had begun the demolition process. At that time the CITY actually owned the property. The CITY sold it to Barbara Hoyle through the City Economic Development Department. Hoyle was not notified of the opportunity to contest the demolition. According to CITY records, Hoyle never got the demolition notice. A notation dated 7-17-95 indicates "Ms. Hoyle in office states never notified . . ." [Exhibit C] The CITY had mailed the demolition notice to Barbara Hoyle in care of another City Department, the City Economic Development Department. [Exhibit D]

Plaintiff knew nothing of the dealings between the Defendant and Hoyle.

Immediately after purchasing the building CURTIS began making improvements. He had a new flat roof installed at a cost of $5500.00 He installed two steel rolling curtain doors at a cost of $2598.00. He also sanded the basement floor; put in ceiling grates to hang a drop ceiling; and removed paneling and finished the interior walls.

Plaintiff filed a Motion for Summary Disposition under MCR 2.116(c)(10) arguing that the demolition was a trespass, because the CITY had not given the required notice of demolition. [Exhibit E] Two theories were argued: (1) that the CITY had released the Lis Pendens by giving Ms. Hoyle a quitclaim deed; and/or (2) that the Lis Pendens had expired, pursuant to statute, and there was no constructive notice of the slated demolition. The CITY also filed a Motion for Summary Disposition arguing that there are no material disputes of fact. The trial Court ruled that there was no material dispute of fact; that the Lis Pendens had expired; and that the CITY had not given proper notice prior to demolition. The Court held an evidentiary hearing on damages.

The trial involved testimony by the Plaintiff, and testimony by expert appraisers for both parties. The Plaintiff's expert gave the structure a value of $45,000.00. The CITY's expert gave the structure a value of $23,000.00. The Court awarded damages in the amount of $25,000.00 for the building, plus $10,000.00 for improvements made by the Plaintiff, totaling $35,000.00. The Court also awarded interest on the $25,000.00 portion dating back to the date of demolition.[Exhibit F]

The Court of Appeals, in a per curium opinion, affirmed the judgment, but vacated $2000.00 in damages awarded.[Exhibit G] Applicant filed a Motion for Reconsideration, which was denied.

Defendant CITY filed this Application.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS PROPER APPLICATION OF THE LIS PENDENS STATUTE AND MICHIGAN CASE LAW

A. STANDARD OF REVIEW

In this case, the trial court granted summary disposition to Plaintiff. This Court reviews a decision on a motion for summary disposition de novo. Pohutski v. Allen Park, 465 Mich 675, 681; 641 NW2D 219 (2002). The Court also reviews an issue of statutory construction de novo. Id.

B. THE COURT OF APPEALS DECISION IS CONSISTENT WITH PRECEDENT INTERPRETING THE STATUTE

In Defendant's Application for Leave it refers to the Michigan Housing Law, MCL 125.401 et seq. Section 408 outlines the minimum requirements. MCL 125.408 The required notice to the owner of the property is outlined in MCL 125.540.

The pertinent City of Detroit Ordinance provision states:

> Notwithstanding any other provisions of this ordinance, when the whole or any part of any building or structure is found to be a dangerous building, the Building Official shall issue a notice to the owner or owners of record that he building or structure is a dangerous building and to appear before a hearing officer who shall be appointed by the Building Official to show cause at the hearing why the building or structure should not be demolished, repaired, or otherwise made safe. All notices shall be in writing and shall be delivered by an agent of the department, or shall be sent by registered or certified mail return receipt requested to the last known address of such owner or owners. In determining the last known address of the owner(s). The department shall

> examine the records of the last City of Detroit and County of Wayne tax assessment and the record of the County of Wayne Registrar of Deeds. If an owner cannot be located after a diligent search, the notice shall be posted upon a conspicuous part of the building or structure.

Detroit City Code, 1984, Section 12-11-28.4(a)

Defendant CITY acknowledges that neither the statute, nor the ordinance specifically deal with the situation where the owner of the property at the time of demolition is different than the person notified. However, Defendant CITY completely ignores Michigan case law. Geftos v. Lincoln Park 39 Mich App 644(1972) is the only case appearing in the "Notes of Decisions" under MCL 125.408.

In Geftos v. Lincoln Park 39 Mich App 644(1972) the Court of Appeals reviewed a claim by a homeowner that he did not receive notice of the impending demolition of his home. In Geftos, like in the case before this Court, the plaintiff had purchased a building that had been previously slated for demolition. Geftos, 647

Actually, the plaintiff in Geftos knew more about the proposed demolition than Mr. CURTIS in this case. The plaintiff in Geftos attended a City Council meeting at which the Council ordered the building demolished. Id.

The Court of Appeals ruled that Geftos was entitled to damages for trespass, because he had not been given proper notice, and there was a deprivation of procedural due process. Id., 654-655.

In Geftos the Court specifically rejected the argument that is being made by Defendant Appellant:

> Nor can it be successfully argued that because the City had on August 15, 1966 (being prior to the time plaintiff took ownership of the premises), declared the home to be a nuisance and ordered its demolition within 30 days, plaintiff was not entitled to any

> additional notice and hearing regarding the renewal of these determinations, he having been apprised of the city's actions prior to the time he took ownership.

Id., 655.

The facts of this case are even more compelling than Geftos. Yet, the CITY has not even mentioned this case, which is the only case appearing in the Notes under the statute. Geftos is binding precedent.

The CITY suggests that the notice provided Mrs. Hoyle (which she apparently didn't get) was sufficient to give them the authority to demolish the building whenever they wanted. The CITY argues that there is nothing more that the CITY has to do to notify a new owner. Michigan law does not support this.

C. THE DECISION OF THE COURT OF APPEALS IS THE ONLY LOGICAL INTERPRETATION OF THE STATUTE MAKING IT HARMONIOUS WITH MICHIGAN REAL ESTATE LAW

Where the Charter of a municipal corporation is silent upon a subject, the applicable general laws of the State must be read into said Charter. Saginaw Counsel –v- Board of Trustees, 321 Mich 641, 647 (1948), and City of Hazel Park –v- Municipal Finance Commission, 317 Mich 582, (1947).

In its decision of the Court of Appeals in this case, the Court ruled:

> It is apparent that the housing law and the City code contemplate that the person who receives notice of a demolition still owns the building at the time of demolition, and neither makes provision for notice to subsequent purchasers. But our legislature has provided a mechanism for precisely that purpose. See MCL 600.2701 (lis pendens as constructive notice). If Defendant had complied with the lis pendens statute, a subsequent bona fide purchaser for value such as Plaintiff would have acquired the property subject to the order of demolition.

MCL 600.2701 is The Lis Pendens Statute. That statute provides that the recording of a Lis Pendens with the Registrar of Deeds gives constructive notice to bind a subsequent claimants. Sheridan v Cameron, 65 Mich 680 (1887). The purpose of recording a Lis Pendens is to satisfy the "notice" requirements. Any subsequent transferee of the property would be charged with "notice." Defendant CITY well knows all of this. This is why it recorded a Lis Pendens back on December 16, 1994.

The Lis Pendens Statute provides that a Lis Pendens is effective for a period of three years from the date of filing. MCL 600.2715. A Lis Pendens may be extended pursuant to the same section of the statute for additional three-year periods.

The rules of statutory construction were concisely stated in Latham v. Wedeking, 162 Mich. App. 9,412 NW2d 225 (1987):

> (1) when a statute is unambiguous, further construction is to be avoided; (2) if an ambiguity exists, the intent of the Legislature must be given effect; (3) a construction which best accomplishes the statute's purpose is favored; (4) statutes are to be interpreted as a whole and construed so as to give effect to each provision; (5) specific words in a statute are given their ordinary meaning unless a different interpretation is indicated; and (6) respectful consideration is to be given to the construction of a statute used by those charged with its application.

Latham, 162 Mich. App. 9, 12,412 NW2d 225 (1987):

Unless defined in the statute, every word or phrase of a statute should be accorded its plan and ordinary meaning, taking into account the context in which the words are used, Phillips v. Jordan, 241 Mich. App. 17, 22-23, n. 1, 614 NW2d 183 (2000), *citing* Western Michigan Univ. Bd. Of Control v. Michigan, 455 Mich. 531, 539, 565 NW2d 828 (1997). Further, the language must be applied as written, Camden v. Kaufman, 240 Mich. App. 389, 394, 613 NW2d 335(2000); Ahearn v. Bloomfield Charter Twp., 235 Mich App 486, 498, 597 NW2d 858 (1999).

There is nothing ambiguous about the Statute. It very clearly indicates that the Lis Pendens has a three-year life. It is obvious under Michigan Law that the Lis Pendens that was recorded by the City of Detroit was not effective in giving constructive notice to Mr. CURTIS. It was dated June 7th, 1994, and recorded December 16th, 1994. [Exhibit A] It had expired June 7, 1997, or December 16, 1997 at the latest. Mr. CURTIS bought the property November 13, 1998.

The limited life of a recorded Lis Pendens is nothing unique. In many instances, legislation dealing with recorded documents provide for a limited life. The Construction Lien Act limits a construction lien's life to one year. MCL 570.1117 The Market Record Title Act provides a 40 year life to all recorded documents. MCL 565.101 et. seq.

The purpose of limited life, or "sunset," provisions is to keep real estate records accurate, and to provide for the marketability of real property. This is not unlike statutes of limitations that are deeply-rooted in civil jurisprudence. The Trial Judge commented on this at length when the Motion was argued.

In Van Slooten v. Larsen, 410 Mich 21, 299 NW 2d 704 (1980) the Supreme Court analyzed the constitutionality of another Michigan statute containing a limitation on the life of a recorded interest. The Dormant Mineral Act requires a claimant to record every twenty years a claim of interest in order to preserve his or her claim to minerals on the land. MCL 554.291 In Van Slooten the Court upheld the act, recognizing the importance of

limitation periods with regard to interests in land, reasoning that "[t]he utility and benefits of requiring periodic recording of interests in land are well-recognized." Id., 48

1. IT IS UNDISPUTED THAT APPELLEE DID NOT RECEIVE ACTUAL NOTICE

It is undisputed that LAWRENCE T. CURTIS received no actual notice that the building was slated for demolition. The first time that he learned of the demolition was the day it was carried out.

The Lis Pendens involved is dated June 7, 1994. At that time the City of Detroit owned the property. It appears Barbara Hoyle was not even given notice. In an amazing display of bureaucratic blunder, the CITY Department of Building and Safety Engineering had actually sent the notice to the City Economic Development office, since the CITY owned the property on June 7, 1994. Records show that the previous owner had even brought this to the CITY'S attention [Exhibit C] It is clear that Plaintiff never received any actual notice. That fact is not in dispute.

2. AS A MATTER OF LAW, CURTIS CANNOT BE CHARGED WITH RECEIVING CONSTRUCTIVE NOTICE

The law does not support an argument that CURTIS had "constructive notice" of the impending demolition more than five years after the demolition order. The only instrument that could possibly have given "constructive notice" was the expired Lis Pendens.

There are many things that the CITY could have done to comply with notice requirements. It could have searched the register of deeds records immediately prior to demolishing the building. It could have demolished it within the three years.

The CITY proposes that the Court ignore the expiration of the Lis Pendens. More than that, it proposes that purchasers of real estate be charged with looking beyond the record title to determine whether demolition proceedings exist. This is contrary to Michigan real estate law.

D. THE COURT SHOULD NOT ENTERTAIN THE ARGUMENT THAT PLAINTIFF WAS NOT A BONA FIDE PURCHASER FOR VALUE, BECAUSE THERE ARE NO FACTS DISPUTING THIS, AND THE CITY WAIVED THIS ARGUMENT

In Plaintiff's Motion for Summary Disposition, Plaintiff argued that he was a bona fide purchaser. He attached an affidavit.[see exhibit E]. This issue was never contested by the Defendant CITY in the trial court.

Defendant CITY OF DETROIT failed to raise this issue in the trial court, thus it is not preserved for appellate consideration, although this Court may consider it if failure to do so would result in manifest injustice. Jishi v General Motors Corp (on remand), 207 Mich App 429; 526 NW2d 24 (1994).

A good-faith purchaser is one who purchases without notice of a defect in vendor's title. Simon v. Brown, 38 Mich 552,555(1878), and Lakeside Associates v. Toski Sands, 131 Mich App 292,298, 346 NW2d 92(1983). The presumption is, that a subsequent purchaser, who has got his deed first recorded, is a bona fide purchaser without notice, until the contrary is made to appear. MCL 565.29, Federman v. Van Antwerp, 276 Mich 344, 267 NW 856 (1936)

The purpose of the recording law is that the true state of the title be represented', i.e., in the public records. See Grand Rapids National Bank v Ford, 143 Mich. 402, 406, 107 N.W. 76, 78 (1929)

There is no merit to the CITY's suggestion that Plaintiff was not a bona fide purchaser. The CITY did not even contest this issue at the trial level.

II. THERE IS NO LEGAL SUPPORT FOR THE CITY'S ARGUMENT THAT THE CITY HAS GOVERNMENTAL IMMUNITY FOR TRESPASS

Applicant has cited no jurisprudence to support the argument for governmental immunity. Interestingly, the CITY does not even address the recent landmark case of Pohutski v. Allen Park, 465 Mich 675; 641 NW2d 219 (2002). In Pohutski the Michigan Supreme Court reversed long-standing precedent and ruled that governmental immunity barred a suit against a city for "trespass-nuisance." That case dealt with a sewage backup for which the plaintiffs (in consolidated cases) had sued the cities of Allen Park and Farmington ills. Id, 679, 680

The Court overruled Hadfield v. Oakland County Drain Commissioner, 430 Mich 139 (1988). However, there are three reasons why Pohutski does nothing to help the CITY'S argument in this Court:

1. The holding in Pohutski was not to be applied retroactively, but "will be applied only to cases brought on or before April 2, 2002. In all cases currently pending, the interpretation set forth in Hadfield will apply." Id., 699;
2. The Court in Pohutski did not rule on the argument that the Plaintiff's claim was one for trespass based on an unconstitutional taking of

property, instead remanding it to the trial court for review of that argument;

3. A trespass by a municipality, unlike a nuisance action, has implications deeply rooted in the Michigan Constitution, making it improper for a statute to be applied to grant the City immunity.

Trespass is based on the Taking Clause of the Michigan Constitution, Article 10, Section 2, and, as a consequence, statutory governmental immunity is not a defense. Li v. Feldt (After Remand), 434 Mich. 584, 594, n. 10, 456 N.W. 2d 55 (1990).

Governmental immunity is not a defense to a constitutional tort claim, hence not a claim based on trespass. Thom v. State Hwy. Comm'r, 376 Mich. 608, 628, 138 N.W. 2d 322 (1965). The claim survives despite the fact that a statutory exception is not present because the law views the trespass or nuisance as an appropriation of property rights. Taylor, Googasian & Falk, Torts Section 7:252 , pp. 7-86.

Not even the state can intrude on a citizen's lawful possession of his property. Ashley v. Port Huron, 35 Mich,. 296, 300 (1877); Herro v. Chippewa Co. Rd. Comm'rs, 368 Mich. 263, 272, 118 N.W.2d 271 (1962). Also, actions under the clause are not limited to claims alleging an absolute conversion of the property. Pearsall v. Supervisors, 74 Mich. 558, 42 N.W. 77 (1889). The action of a governmental agency may constitute a taking when it interferes with, damages, or destroys the property of an individual. Buckeye Union Fire Insurance v. Michigan 383 Mich 630,642, 178 N.W. 2d 476(1970).

The CITY has cited no jurisprudence to support the argument for governmental immunity. There is no support for the notion that a city can commit such a

blatant trespass (demolition), and be immune. Such a ruling would most certainly fail to survive Constitutional attack.

Even the recent decision of Pohutski v. Allen Park, supra, does not go this far. If anything, Pohutski would support an award of damages to Appellee, because it would not be applied to this case.

III. THE COURT SUFFICIENTLY ARTICULATED ITS THEORY FOR FINDING LIABILITY

The purpose of MCR 2.517 is to aid the appellate court by affording it a clear understanding of the grounds or the basis for the trial court decision. Johnson v. Wynn, 38 Mich. App. 302, 196 N.W.2d 313 (1972).

MCR 2.517(A)(1) provides that a trial court, sitting as the finder of fact, must find the facts specially, state its conclusions of law separately, and direct entry of the appropriate judgment. "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts." MCR 2.517(A)(2). The trial court is not required to comment on every matter in evidence or declare acceptance or rejection of every proposition argued. Fletcher v. Fletcher, 447 Mich. 871, 883-884; 526 NW2d 889 (1994), quoting Baker v. Baker, 411 Mich. 567, 583; 309 NW2d 532 (1991).

Applicant can't seriously be arguing that the Court did not fully articulate the legal theory on which it granted Judgment to Plaintiff. There were three separate hearings dealing with the Motion of Summary Disposition, January 25, 2002; March 7, 2002; and May 3, 2002.

At the hearing on May 3, 2002 the Judge stated unequivocally:

> "What happened here was a trespass. The City trespassed on private property, tearing it down without giving sufficient and statutory notice to the owners. I mean, I know all the review. I mean, you can say it all over again but you know I know it because we sat here and tried it and I heard on a motion before that."

[Exhibit H]

Even the City of Detroit attorney recognized that the Court was granting the relief based on trespass:

> MR. KEELEN: Well, your Honor, I, I agree. You have recited the history of this and I wanted to make sure that I gave your Honor the clear indication that at the end of the day, at the point in time when you have ruled and did rule that we failed to adequately notify Mr. Curtis and thereby did not conform with the ordinance and we thereby became a trespass, that the last issue that may not have been clear or addressed or whatever before, is whether that still cloaks the City in governmental immunity. You've clear said you'd fine – clearly said just now that you didn't think so and I'll accept that –"

[Exhibit H]

The facts in this case are not complicated. It is very clear from the hearing transcripts that not only did the Judge clearly articulate that he was finding for the Plaintiff based on trespass, but the attorney for the CITY clearly knew this.

IV. THE AWARD OF INTEREST AS A COMPONENT OF DAMAGES FROM THE DATE OF DEMOLITION IS SUPPORTED BY THE RECORD AND MICHIGAN TRESPASS CASE LAW

In reviewing the finding of facts in a non-jury trial there is "clearly erroneous" standard. This requires the reviewing court to conclude with a "definite and firm conviction that a mistake has been committed." Tuttle v. Department of State Highways, 397 Mich 44,46, 243 NW2d 244(1976)

Damages in an action for trespass to land are measured by the difference between the value of the land before the harm and the value after the harm. Schankin –v- Buskirk, 354 Mich 490, 494 (1958). There is no fixed rule for determining the appropriate sum of damages. "Rather, courts are to apply whatever approach is most appropriate to compensate the Plaintiff for the loss incurred. Szymanski –v- Brown, 221 Mich App 423, 430 (1997).

It is generally accepted that the measure of damages for trespass are market value of the property. In this regard, one looks at "highest and best use" of the property. Highest and best use is "the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." St. Clair Shores v Coley, 350 Mich 458 (1957).

"The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case." In re Bagley Avenue, Detroit, 248 Mich 1, 4 226 NW 688 (1929).

Additionally, a litigant should not be penalized for not being able to provide a precise evaluation. It has long been held that damages are not rendered uncertain because they are not calculated with exactness. A Defendant whose wrongful conduct makes computation of damages difficult is not entitled to complain that the calculation is not exact. Eastman Kodak Co. v Southern Photo Material Co., 273 US 359, 47 S. Ct 400 (1927).

Interest is an allowable element of damages in trespass cases. Gates v Comstock, 113 Mich 127 (1897). It is allowable from the date of the trespass. Lane v Ruhl, 103 Mich 38 (1894).

The evidentiary hearing in this case dealt only with damages. The Court's opinion covered twenty-four pages of the transcript. The Court ruled that the Plaintiff was entitled to $25,000.00 for the value of the property, and $10,000.00 for the improvements he made to the property.

The Court also awarded interest on the $25,000.00 going back to the date of the demolition. [March 12, 2002, transcript, pages 63-64] Interest dating back to the trespass is a permissible component of damages. Lane v Ruhl, 103 Mich 38 (1894).

The damages presented by the Plaintiff greatly exceeded those awarded. There is sufficient evidence supporting the damages awarded. The amount of damages, $35,000.00, is a little below the average of the two experts values of $45,000.00 and $23,000.00.

Applicant should not be able to pick apart and criticize isolated aspects of the damage award in light of the fact that the CITY created the difficulty of establishing precision by tearing down the building.

VII. CONCLUSION

The CITY OF DETROIT did not comply with the legal requirements of giving notice to LAWRENCE CURTIS. It is clear from the only case appearing in the Notes following MCL 125.408 that a municipality has to give notice to subsequent purchasers. The CITY could have done this in two different ways. Firstly, it could have provided actual notice by mailing him the Notice. Secondly, it could have done this by

recording a Lis Pendens and giving him constructive notice. It did properly record a Lis Pendens. However, that Lis Pendens had expired by operation of law. That being the case, the City cannot hide behind the argument of "constructive notice."

The CITY's argument that it did not need to do what it did is wrong, and, if adopted as law, would have serious implications for real estate marketability. It would contradict Michigan's race-notice scheme, making buyers responsible to look beyond the record title.

The trial court specifically ruled that the CITY had committed a trespass. The factual basis for that finding is within the transcript, and is obvious from the facts.

There is no legal basis for a finding of governmental immunity. Such a ruling would stand on its head the Michigan Constitution. There is no legal support for such an argument. In fact, the recently decided case of Pohutski –v- Allen Park, supra, could not be applied to this case, since it was pending at the time of that decision.

The evidence supports the damages awarded. The Trial Judge's findings and verdict show an elaborate analysis of the two experts' opinions, and consideration of the money expended by the Plaintiff in fixing up the property.

Finally, it is within the discretion of the trial court to award interest back to the date of the demolition. There is case law to support this, and it more appropriately makes the Plaintiff whole.

This case involves decisions made by the trial judge based on clear precedent. It is consistent with fundamental real estate law as it relates to marketability of title. The CITY proposes ignoring the stated language of the Lis Pendens Statute with far-reaching implications.

For the reasons stated in this Brief this Court should deny the request for further review.

Respectfully submitted,

MERCHAN & CORBIN, P.C.

KIM CORBIN P39273
Attorney for Defendants
15206 Mack Ave.
Grosse Pointe Park, MI 48230
(313) 886-4466